IN THE

Supreme Court of the United States

October Term, 1979
No. 78-1487

FORD MOTOR CREDIT COMPANY, *et al.*,

Petitioners,

vs.

DENNIS MILHOLLIN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR THE PETITIONERS.

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SUBJECT INDEX

I — Page

Introductory Statement and Summary of Argument.. 1

II

Acceleration and Prepayment Are Distinct Concepts and Should Not Be Equated for Purposes of the Act or the Regulation 6

A. Respondents Have Erroneously Equated Prepayment With Acceleration 6

B. Prepayment and Acceleration Are Not Equals 8

III

The Federal Reserve Board's Official Staff Interpretation Should Be Followed 14

A. Introductory Statement 14

B. Restatement of the Federal Reserve Board's Official Staff Interpretation 15

1. Section 226.8(b)(4) 15

2. Section 226.8(b)(7) 18

C. The Official Staff Interpretation Should Be Followed 20

IV

The New Issues Raised for the First Time in This Court by Respondents and Clients Council Have No Merit 28

A. Petitioners Have Not Violated Section 226.6(c) of the Regulation 28

Page

B. The $15.00 Acquisition Fee Has Been Properly Disclosed and Is Not a Default Charge as Claimed by Clients Council 29

V

Conclusion 30

Appendix A. Memorandum .....App. p. 1

TABLE OF AUTHORITIES CITED

Cases Page

Begay v. Ziems Motor Co., 550 F.2d 1244 (10th Cir. 1977) 26

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 27

Croysdale v. Franklin Savings Ass'n, 601 F.2d 1340 (7th Cir. 1979) 26

Garza v. Chicago Health Clubs, Inc., 347 F.Supp. 955 (N.D. Ill. 1972) 21, 26

Griffith v. Superior Ford, 577 F.2d 455 (8th Cir. 1978) 11, 12

Griggs v. Duke Power Co., 401 U.S. 424 (1971).... 20

Johnson v. McCrackin-Sturman Ford, Inc., 527 F. 2d 257 (3d Cir. 1975) 26

Martin v. Commercial Securities Co., Inc., 539 F.2d 521 (5th Cir. 1976) 26

McDaniel v. Fulton National Bank, 571 F.2d 948 (5th Cir.) (en banc), reh. denied, 576 F.2d 1156 (5th Cir. 1978) 26

Milhollin v. Ford Motor Credit Co., 588 F.2d 753 (9th Cir. 1978) 2, 6, 13, 26

Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973) 20, 28

Ocean A. & G. Corp. Ltd. v. Albina M.I. Wks., 122 Ore. 615, 260 P. 229 (1927) 12

Perry v. Liberty Consumer Discount Co., 433 F. Supp. 1352 (E.D. Pa. 1977), aff'd mem., 577 F.2d 728 (3d Cir. 1978) 9, 11, 12

Page

Power Reactor Development Co. v. Electricians, 367 U.S. 396 (1961) 20

Price v. Franklin Investment Co., Inc., 574 F.2d 594 (D.C. Cir. 1978) 26

St. Germain v. Bank of Hawaii, 573 F.2d 572 (9th Cir. 1977) 26, 27

Thorpe v. Housing Authority, 393 U.S. 268 (1969) 27

Udall v. Tallman, 380 U.S. 1 (1965) 20, 27

Yandell v. United States, 208 F. Supp. 306 (D. Ore. 1962) 12

Zenith Radio Corp. v. United States, 437 U.S. 443 (1978) 20

Federal Register

41 Federal Register 28255-56, July 9, 1976 25

41 Federal Register 28256, July 9, 1976 23

43 Federal Register 18539-18540, May 1, 1978 25

43 Federal Register 18540, May 1, 1978 23

Miscellaneous

Washington Credit Letter, pp. 5, 8 (October 15, 1979) 22

Federal Reserve Board Staff Letter No. 851 [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,173, October 22, 1974 .....14, 16

Federal Reserve Board Staff Letter No. 1208 [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,647, July 6, 1977 .....14, 17

Page

Federal Reserve Board Staff Letter No. 1324, Cons. Cred. Guide (CCH) ¶31,824, November 14, 1978 14

Official Staff Interpretation No. FC-0054, 42 F.R. 18056 [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,552, April 4, 1977 .....4, 14, 25

Public Information Letter No. 444 [1969-1974 Transfer Binder] Cons. Cred. Guide (CCH) ¶30,640, March 1, 1971 .....23, 24

Regulations

Federal Reserve Board Regulation Z, 12 C.F.R., Sec. 226.6(c) 5, 28, 29

Federal Reserve Board Regulation Z, 12 C.F.R., Sec. 226.8(b)(4) 2, 3, 4, 6, 7, 15, 21, 25

Federal Reserve Board Regulation Z, 12 C.F.R. Sec. 226.8(b)(7) 2, 3, 5, 6, 7, 18, 19, 27, 29

Rules

Rules of the Supreme Court of the United States, Rule 23(1)(c) 29

Statutes

Mich. Comp. Laws, Sec. 492.120 15

N.C. Gen. Stat., Sec. 25A-29 15

Oregon Revised Statutes, Sec. 83.620(1) (Or. L. 1977) 12, 14

Oregon Revised Statutes, Sec. 83.660 (Or. L. 1977) 12

Pa. Stat. Ann. tit. 69, Sec. 621 15

Page

Truth in Lending Act, Sec. 128(a)(9), 15 U.S.C. Sec. 1638(a)(9) (1976) 15

Truth in Lending Act, Sec. 130(f), 15 U.S.C. Sec. 1640(f) (1976) 20, 23

United States Code, Title 5, Sec. 553 (1976) 25

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REPLY BRIEF FOR THE PETITIONERS.

I
INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT.

This Reply Brief for the Petitioners is filed in response to the Brief for the Respondents[1] and the Brief Amicus Curiae of National Clients Council, Inc.[2] (herein "Clients Council").

The issue in these cases is whether any disclosures are required under the Truth in Lending Act (herein "Act") or Regulation Z promulgated by the Board of Governors of the Federal Reserve System (herein

[1]Cited herein as "Resp. Br."

[2]Cited herein as "A.C. Br."

"Regulation") by reason of the existence in a consumer credit contract of an acceleration clause.[3]

Neither the Act nor the Regulation even mention acceleration and neither specifically requires any disclosure of the right of acceleration. Respondents and Clients Council claim, nevertheless, that acceleration disclosures are required by section 226.8(b)(4) of the Regulation. That section requires disclosure of the amount or method of computing the amount of any default, delinquency or similar charges payable in the event of the late payment of contract installments. In addition, Respondents claim that acceleration disclosures are required by section 226.8(b)(7) of the Regulation which requires disclosure of the creditor's rebate policy upon prepayment in full of a consumer credit contract.

The Respondents build their entire case against the Petitioners upon the erroneous assumption that the creditor's exercise of the right of acceleration of an indebtedness is a prepayment of the indebtedness. In effect, Respondents claim that when a creditor demands payment of the unpaid balance of an indebtedness

[3]The facts in these cases are for the most part undisputed. Respondents, however, have mischaracterized the actions of the Petitioners with respect to the default in the *Milhollin* case. The Milhollins were in default under the contract almost from the date that it was signed. They refused to purchase insurance on the vehicle as promised and their failure to make the monthly installment payments as scheduled is apparent from a review of the payment record cited by Respondents. Resp. Br. at 5 n. 7. The efforts of FMCC to persuade the Milhollins to comply with the terms of the contract are detailed in the affidavit of Peter J. Deckers. J.A. at 23-25. These efforts included several letters and at least 10 telephone calls. The reference by Respondents to the Milhollins' loss of the payments they made on the vehicle, Resp. Br. at 6, conveniently ignores the Petitioners' much larger investment in the vehicle which was exposed by the Milhollins' default.

upon the debtor's default, this demand for payment is itself a payment by the debtor for purposes of the Act and the Regulation. In this Reply Brief, Petitioners will show that prepayment and acceleration are antitheticals, not equals. The term prepayment means a *payment* of an indebtedness before the scheduled maturity date specified in the contract. Acceleration, on the other hand, is the act by which the creditor *demands payment* of an indebtedness as a result of the debtor's default. The creditor's exercise of the right of acceleration may result in a prepayment of the indebtedness by the debtor, but it often does not.

Respondents have also misconceived the nature and function of a rebate of precomputed finance charges. In a precomputed contract, finance charges are computed based upon the amount of credit extended and the length of time it is to be outstanding *i.e.*, until the final installment payment date. No rebate would or should be made unless and until payment is received since up to that point the credit is still outstanding. It is only when payment is received in advance of the scheduled payment date that there is any reason to rebate any part of the finance charges. If payment is not received in advance of the scheduled date, the finance charges are fully earned and no rebate would be due. Acceleration is only the exercise of a right to advance the due date of payment. But until payment is actually made, no rebate comes into play since the finance charges continue to be earned until payment.

The Federal Reserve Board (herein "Board") has issued an Official Staff Interpretation concerning the application of sections 226.8(b)(4) and 226.8(b)(7)

of the Regulation to acceleration clauses.[4] Both Respondents and Clients Council concede in their briefs that if this Court approves the Official Staff Interpretation, the decision of the lower court must be reversed. Respondents and Clients Council agree that Petitioners have made all of the disclosures required by the Act and the Regulation as interpreted by the Board. This is also the position taken by the United States in its Amicus Curiae Brief filed at the invitation of this Court. In its Amicus Curiae Brief in Support of Petitioners, the United States urges that the Board's Official Staff Interpretation be approved and applied to these cases and that the decision of the lower court be reversed.

To counter this dilemma, Respondents and Clients Council take drastically conflicting positions. Clients Council argues that only official Board Interpretations of the Act and the Regulation are entitled to judicial deference. It asserts that Official Staff Interpretations are entitled to no deference even though they are issued pursuant to an express Congressional directive that was intended to promote creditor compliance with the Act and the Regulation and to discourage litigation. From this premise, Clients Council argues that the Official Staff Interpretation concerning acceleration should be disregarded and this Court should hold that the right of acceleration must always be disclosed as a "default, delinquency or similar charge" pursuant to section 226.8(b)(4) of the Regulation. This argument by Clients Council has been rejected not only by the Board but also by all seven federal courts

[4]Official Staff Interpretation No. FC-0054, 42 F.R. 18056, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,552, April 4, 1977.

of appeals that have considered it, including the Ninth Circuit in the decision below. In fact, the only case that Clients Council cite in support of their argument is a district court decision that has been expressly overruled.

Respondents understandably disagree with the position taken by Clients Council. Respondents argue that the Official Staff Interpretation concerning acceleration is sound since it furthers the disclosure purposes of the Act and the Regulation. Respondents, however, ask this Court to amend the Official Staff Interpretation so that it equates acceleration with prepayment and thereby requires the creditor to disclose, under section 226.8(b)(7) of the Regulation, its method of rebate upon acceleration. This argument by Respondents misconceives the role of the judiciary in reviewing agency interpretations of their own regulations. And, the amendment to the Official Staff Interpretation proffered by Respondents should be rejected in any event since it improperly equates acceleration with prepayment.

Both Respondents and Clients Council raise new issues that were never presented in any of the courts below and were not raised in the Petition for a Writ of Certiorari or the Answer to the Petition filed by the Respondents. Respondents argue that Petitioners have violated section 226.6(c) of the Regulation that prohibits creditors from disclosing additional credit information that contradicts, obscures or detracts attention from the information required to be disclosed by the Regulation. Respondents claim that acceleration and prepayment are equivalents and that Petitioners' prepayment rebate disclosure provided pursuant to section 226.8(b)(7) of the Regulation conflicts with the acceleration clause on the back side of the contracts.

Petitioners will demonstrate in this Reply Brief that acceleration and prepayment are not equivalents and that Petitioners' prepayment disclosure is consistent with the acceleration clause.

Clients Council raises a new issue that is not even pressed by the Respondents. Clients Council argues that the $15.00 acquisition fee that is referred to in Petitioners' prepayment rebate disclosure is a default charge within the meaning of section 226.8(b)(4) of the Regulation. This acquisition fee is a sum that is deducted in computing the rebate of unearned finance charges upon a prepayment of the contract. The acquisition fee is clearly disclosed under section 226.8(b)(7) of the Regulation and has nothing to do with a default under the contract. The claimed violation by Clients Council should be rejected.[5]

II

ACCELERATION AND PREPAYMENT ARE DISTINCT CONCEPTS AND SHOULD NOT BE EQUATED FOR PURPOSES OF THE ACT OR THE REGULATION.

A. Respondents Have Erroneously Equated Prepayment With Acceleration.

Throughout their brief, Respondents equate acceleration of a consumer credit contract with a prepayment of the contract. Respondents take the position that when a creditor demands payment of the unpaid balance of a consumer credit contract upon default, that demand for payment is itself a payment of the indebtedness for purposes of the Act and the Regulation. All of the violations of the Act and the Regulation alleged

[5]Clients Council also argues that, in the *Milhollin* case, FMCC actually retained $28.01 in unearned finance charges. This argument is premised upon a miscalculation by Clients Council of the unearned finance charges applicable to the Milhollin account. *See* note 11, *infra*.

by the Respondents stem from and rest upon this faulty premise. For example:

(1) Respondents claim that acceleration should be equated with prepayment, thereby bringing acceleration within the prepayment disclosure requirements of section 226.8(b)(7) of the Regulation. Upon this basis, Respondents claim that under section 226.8(b)(7), a creditor must disclose its method of rebating unearned finance charges "upon acceleration." If the creditor rebates under one method "for acceleration" and another for voluntary prepayment, Respondents contend that separate disclosures are required. Resp. Br. at 9, 22, 23, 24, 40, 41, 49.

(2) Respondents claim that acceleration, like prepayment, involves an early "termination" of the contract that should occasion a rebate of unearned finance charges. If a creditor does not provide such a rebate upon acceleration, Respondents claim that the creditor has the right to collect and retain unearned finance charges and that right must be disclosed as a default charge under section 226.8(b)(4) of the Regulation. Resp. Br. at 8, 9, 11, 19, 24, 26, 39, 43, 44, 47. This is so, according to Respondents, even though both the creditor's contract and state law provide that the creditor must rebate unearned finance charges upon any prepayment of the indebtedness following acceleration.

(3) Respondents claim that since acceleration constitutes a prepayment, an acceleration clause that does not provide for a rebate of unearned finance charges upon acceleration conflicts with a prepayment clause that discloses such a rebate. Resp. Br. at 10, 25, 26.

In short, the equation of acceleration with prepayment is a central thesis of Respondents' brief that forms an indispensable basis for each of their claims that Petitioners have violated the Act and the Regulation.[6]

B. Prepayment and Acceleration Are Not Equals.

The critical difference between acceleration and prepayment can be easily demonstrated. The term "prepayment" means a payment of the indebtedness before the originally scheduled maturity date as set forth in the installment contract. Acceleration, on the other hand, is the act by which the creditor, upon the debtor's default under the contract, declares that all unpaid installments are due and payable. Acceleration may ultimately result in a prepayment if the debtor, after acceleration, pays the indebtedness in full before the originally scheduled maturity date. However, acceleration often does not result in a prepayment since a debtor who is in default in making one or more installment payments under the contract is not likely to be in a position to pay all of the installments at once. As stated in the brief filed by Clients Council:

[6]It is interesting that Respondents' brief is not internally consistent on this point. Although Respondents claim throughout their brief that acceleration and prepayment should be equated, they devote one entire section of their brief to an argument that "Acceleration and Prepayment are Separate Concepts, Both Legally and In the Mind of the Average Consumer." Resp. Br. at 36. The brief filed by Clients Council vigorously assails Respondents' proposition that acceleration and prepayment are equals:

> "This equation of acceleration of payments with voluntary prepayment is totally erroneous from both the consumer's and creditor's perspective, as is evident from an elementary comparison of the processes involved." A.C. Br. at 35.

> "The consumer who has fallen behind on monthly payments rarely is capable of making a lump sum payment upon demand; indeed, the regular payment typically has been late precisely because of inability to pay even this smaller sum. Few creditors expect actual payment of the accelerated payment upon demand; rather, they anticipate the additional events of repossession and a deficiency judgment." A.C. Br. at 35.

Acceleration is thus the act by which the creditor *attempts* to obtain prepayment in full of the contract:

> "As I view it, acceleration is but the first step by the lender in *attempting* to obtain prepayment from the borrower; in no sense can acceleration and prepayment be equated." *Perry v. Liberty Consumer Discount Co.*, 433 F. Supp. 1352, 1359 (E.D. Pa. 1977), *aff'd mem.*, 577 F.2d 728 (3d Cir. 1978) (emphasis in original).

Contrary to the claim made by Respondents throughout their brief, acceleration does not "terminate" the contract relationship between the parties. The contract is terminated only when the indebtedness is paid in full following acceleration. Until that payment is made, the debtor has the continued use of the creditor's funds and all finance charges continue to be earned. There are no unearned finance charges that should be rebated upon acceleration.

The acceleration clause in the Petitioners' contracts entitles FMCC to demand payment of the unpaid balance upon a default under the contracts. The clause does not provide for a rebate of unearned finance charges upon acceleration because, as explained above, acceleration is not a prepayment of the indebtedness

and there are no unearned finance charges to be rebated upon acceleration. It would be inaccurate, misleading and confusing for FMCC to disclose that it rebates unearned finance charges upon acceleration since there are no unearned finance charges to rebate upon acceleration and no rebate is provided. In fact, if FMCC had made either the disclosure suggested by the Respondents[7] or the disclosure suggested by Clients Council,[8] Respondents and Clients Council would now be claiming that FMCC violated the Act by disclosing that it rebates unearned finance charges "upon acceleration" when no such rebate is provided.[9]

Should the buyer elect to prepay the indebtedness following an acceleration by FMCC, paragraph 14 on the front side of the FMCC contract clearly provides and discloses that FMCC will rebate unearned finance charges:

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[7]Respondents suggest that FMCC should have made the following disclosure:

> "In the event of prepayment in full or acceleration of the obligation, Buyer shall receive a rebate of the unearned portion of the finance charge computed under the sum of the digits method." Resp. Br. at 42.

[8]Clients Council suggests that FMCC should have made the following disclosure:

> "If you (the buyer) pay any installment late or otherwise break this agreement, I (the seller) can demand the immediate payment of the entire amount of money you still owe me under this contract. You will receive a credit for unearned FINANCE CHARGES, computed by the sum of the digits method after first deducting $15.00." A.C. Br. at 9.

[9]The impossible task that creditors face in drafting disclosures that will not be attacked on some theory is further illustrated by the fact that the disclosures suggested by Respondents and Clients Council are not even consistent with each other. The disclosure suggested by Respondents, note 7, *supra*, violates the disclosure required by Clients Council, note 8, *supra*, since Respondents' disclosure does not identify the $15.00 acquisition fee. Clients Council insists that this fee is a default charge that must be separately disclosed. *See* A.C. Br. at 26-27.

> "(14) Prepayment Rebate: Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final instalment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after first deducting an acquisition fee of $15.00. No rebate will be made if the amount is less than $1.00." [J.A. 9, 65]

This clause requires a rebate if the buyer pays the indebtedness in full "at any time prior to maturity of the final instalment hereunder." The wording clearly applies to a payment in full by the buyer for any reason as long as the payment is made before the scheduled maturity date of the final installment as set forth in the contract. *See Griffith v. Superior Ford*, 577 F.2d 455, 460 n. 6 (8th Cir. 1978) (interpreting the identical FMCC disclosure form); *Perry v. Liberty Consumer Discount Co.*, 433 F. Supp. 1352, 1357-58 (E.D. Pa. 1977), *aff'd mem.*, 577 F.2d 728 (3d Cir. 1978).

When read together, the FMCC acceleration clause and the prepayment rebate clause in paragraph 14 of the contract are consistent. The acceleration clause entitles FMCC upon the buyer's default to demand that the buyer make all installment payments immediately. If the debtor prepays the contract in accordance with this demand, the prepayment clause clearly requires that the buyer be given a rebate of unearned finance charges.

The foregoing analysis of FMCC's contract is consistent with Oregon state law and FMCC's actual rebate practice. The Oregon rebate statute mandates a rebate of unearned finance charges upon any prepayment of the contract. O.R.S. § 83.620(1) (Or. L. 1977). *See*

Brief for the Petitioners at 7, n. 3. Pursuant to Oregon law, this statute becomes a part of the contract between the parties. *E.g., Ocean A. & G. Corp. Ltd. v. Albina M. I. Wks.*, 122 Ore. 615, 260 P. 229 (1927); *Yandell v. United States*, 208 F. Supp. 306 (D. Ore. 1962). Respondents admit that this statute applies to any payment of the indebtedness before the scheduled date of maturity of the obligation. Resp. Br. at 29. *See Griffith v. Superior Ford*, 577 F.2d 455, 460 n. 7 (8th Cir. 1978) (interpreting a nearly identical Minnesota rebate statute); *Perry v. Liberty Consumer Discount Co.*, 433 F.Supp. 1352, 1357-58 (E.D. Pa. 1977) *aff'd mem.*, 577 F.2d 728 (3d Cir. 1978). They claim, however, that this rebate requirement is somehow not applicable to a prepayment following acceleration because of section 83.660 of the Oregon Motor Vehicle Sales Act.[10] However, section 83.660 merely prevents arbitrary and unreasonable enforcement of an acceleration clause. It does not conflict with the rebate section of the Oregon Motor Vehicle Sales Act which clearly requires a rebate of unearned finance charges upon any prepayment of the contract, including a prepayment following acceleration.

In accordance with its rebate disclosure in paragraph 14 and the foregoing Oregon state law, FMCC's practice in all cases is to rebate unearned finance charges upon payment of the indebtedness following accelera-

[10]That section provides:

"Acceleration Provision. No provision in a retail installment contract by which, in the absence of the buyer's default, the holder may, arbitrarily and without reasonable cause, accelerate the maturity of any part or all of the time balance is enforceable. This section does not prohibit provisions in a retail installment contract accelerating any part or all of the time balance in the event of sale or transfer, or removal outside the state of the motor vehicle covered by the contract." O.R.S. 83.660 (Or. L. 1977).

tion. J.A. 22, 68. Both Respondents and Clients Council strain to discover a conflict between the FMCC rebate policy articulated in the Plummer affidavit filed in the *Milhollin* case (J.A. 22) and the FMCC rebate policy articulated in the Bellisario affidavit filed in the *Eaton* case (J.A. 68). Resp. Br. at 30-31; A.C. Br. at 25. There is no conflict between the affidavits. The Plummer affidavit states that if FMCC decides to accelerate the indebtedness upon default, the method of computing the rebate is the same as that provided upon voluntary prepayment. The Plummer affidavit does not state when the rebate is actually provided to the buyer. The Bellisario affidavit makes it clear that the rebate is provided to the buyer when FMCC is actually prepaid following acceleration.[11]

[11]Clients Council claims that in the *Milhollin* case FMCC actually retained $28.01 in unearned finance charges. A.C. Br. at 19, 20. This claim is simply not supportable. In the first place, the Milhollins did not at any time prepay the contract indebtedness, so that FMCC could not have retained any unearned finance charges as claimed by Clients Council. The payoff quotation of $2,440.42 supplied to the Milhollins (J.A. 18) was derived as follows: $3,084.64 (total of payments), plus $263.52 (vendors single interest insurance premium), plus $22.23 (V.S.I. insurance premium service charge), plus $24.50 (repossession expenses), plus $9.73 (late charges); less $342.72 (installment payments made by the Milhollins), less $424.79 (finance charge rebate), less $176.56 (V.S.I. insurance premium rebate), less $20.13 (V.S.I. insurance premium service charge rebate).

The $28.01 difference between the quotation calculated by Clients Council and the accurate quotation as supplied by FMCC results from: (1) the failure of Clients Council to take into account the $22.23 V.S.I. insurance premium service charge; (2) the failure of Clients Council to take into account the $24.50 repossession expenses; (3) the use by Clients Council of the wrong rebate decimal for the rebate of V.S.I. insurance premiums since the V.S.I. insurance was purchased on October 4, 1974 which was after the contract was signed, and (4) the use by Clients Council of a finance charge rebate decimal based upon the February, 1975 installment payment date rather

(This footnote is continued on next page)

III

THE FEDERAL RESERVE BOARD'S OFFICIAL STAFF INTERPRETATION SHOULD BE FOLLOWED.

A. Introductory Statement.

The Board has issued an Official Staff Interpretation[12] concerning acceleration disclosures. This Official Staff Interpretation was preceded by a Staff Letter[13] and was followed by two additional Staff Letters.[14] Both Respondents and Clients Council admit that the decision of the lower court must be reversed if the Board's Official Staff Interpretation is applied since the Petitioners' disclosures comply with that Interpretation.

Neither Respondents nor Clients Council make any effort in their briefs to read the Official Staff Interpretation and the Staff Letters together. Instead, they focus on isolated passages from two of the Staff Letters and attempt to establish through hypothetical analysis and multiple supposition that the Board could have done a better job. They have failed to establish that

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than the March, 1975 installment date. FMCC's use of the March, 1975 finance charge rebate decimal is dictated by the Oregon rebate statute, O.R.S. § 83.620(1) (Or. L 1977), and provided the Milhollins with a payoff quotation that was good for the entire period of statutory redemption applicable to the vehicle.

[12]Official Staff Interpretation No. FC-0054, 42 F.R. 18056, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,552, April 4, 1977. *See* Brief for the Petitioners, App. B at 18-20.

[13]Federal Reserve Board Staff Letter No. 851, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,173, October 22, 1974. *See* Brief for the Petitioners, App. B at 20-21.

[14]Federal Reserve Board Staff Letter No. 1208, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,647, July 6, 1977; Federal Reserve Board Staff Letter No. 1324, Cons. Cred. Guide (CCH) ¶31,824, November 14, 1978. *See* Brief for the Petitioners, App. B at 22-26.

the Official Staff Interpretation is plainly erroneous and they offer no convincing reason why it should not be followed.

B. Restatement of the Federal Reserve Board's Official Staff Interpretation.

1. Section 226.8(b)(4).

Section 226.8(b)(4) of the Board's Regulation provides that the creditor shall disclose "the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments." 12 C.F.R. § 226.8(b)(4) (1978).[15]

In the Official Staff Interpretation, the Board's Staff concluded that the phrase "default, delinquency or similar charges" refers to specific pecuniary sums payable with the late payment of contract installments. It does not apply to the right of acceleration or to other contract remedies exercisable upon default. The Board's Official Staff Interpretation is clearly supported by the plain meaning of the terms used in the Act and the Regulation and by the legislative history of the Act.[16]

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[15]The default charge disclosure requirement in the Act is similar. It requires disclosure of "the default, delinquency, or similar charges payable in the event of late payments." Truth in Lending Act § 128(a)(9), 15 U.S.C. § 1638(a)(9) (1976).

[16]*See* Brief for the Petitioners at 34-38; Brief for the United States as Amicus Curiae at 16-22. Clients Council argues that the Board's Interpretation renders the term "default charge" meaningless since late payment penalties of the type described by the Board are universally referred to as "delinquency charges." A.C. Br. at 12-13. However, such late payment penalties are referred to interchangeably as default charges and delinquency charges. *See e.g.*, Mich. Comp. Laws § 492.120; N.C. Gen. Stat. § 25A-29; Pa. Stat. Ann. tit. 69, § 621, all referring to late payment penalties as "default charges."

The Official Staff Interpretation states that the Staff views a payment following acceleration as essentially a prepayment of the contract obligation. If the creditor rebates unearned finance charges upon such a prepayment following acceleration in accordance with its rebate disclosure, no default charges are imposed by reason of the acceleration. However, the Staff concluded that if the creditor does not rebate unearned finance charges upon payment of the indebtedness following acceleration in accordance with its prepayment rebate disclosure, then the amount of unearned finance charges retained by the creditor is a form of default charge that must be disclosed.[17]

Respondents and Clients Council attack the Official Staff Interpretation by focusing upon claimed ambiguities and inconsistencies in certain of the Staff Letters. First, they claim that Staff Letter 851, written before the Official Staff Interpretation was published, equated acceleration with prepayment which is inconsistent with the Official Staff Interpretation. Resp. Br. at 45; A.C. Br. at 34-35. However, Staff Letter 851 did not state that the Staff views acceleration as a prepayment. In Staff Letter 851, the Staff stated that it views an *acceleration of payments* as a prepayment. In the subsequent Official Staff Interpretation, the Staff made it clear that in Staff Letter 851 it was referring to a *payment following acceleration* as a prepayment. *See* Brief for the Petitioners at 41-42. The Staff Letter and Official Staff Interpretation are therefore consistent and correct.

[17]The Board's Staff could have logically concluded that even where the creditor does not rebate unearned finance charges upon payment of the indebtedness following acceleration, no default charge disclosures are required. The creditor's failure to provide such a rebate increases only the yield to the creditor on the transaction since the creditor's funds will have been outstanding over a shorter period of time. This increase in the yield caused by a default, acceleration and repossession was considered by Congress to be "a subsequent event or occurrence" that would not trigger disclosure obligations under the Act or the Regulation. *See* Brief for the Petitioners at 38 and n. 23.

Second, Respondents and Clients Council complain that under Staff Letter 1208 a creditor having the contract right to retain unearned finance charges upon payment of the indebtedness following acceleration may avoid disclosure of that right by relying upon a hidden policy not to enforce that right. Resp. Br. at 51-52; A.C. Br. at 39-42. Even if Respondents and Clients Council were properly interpreting Staff Letter 1208, their concerns are not well founded. FMCC is required by its contract/disclosure statement and by Oregon state law to rebate unearned finance charges upon payment of the indebtedness following acceleration. For this reason, it could not unilaterally change its rebate policy as hypothesized by Respondents and Clients Council.

In any event, Respondents and Clients Council have misread Staff Letter 1208. That Letter does not deal with a case where the contract permits the creditor to retain unearned finance charges upon payment of the indebtedness following acceleration. Staff Letter 1208 was speaking to the usual case where the disclosure statement provides for a rebate upon prepayment and the contract contains an acceleration clause that is silent concerning the creditor's rebate policy upon payment of the indebtedness following acceleration. In this case, the Staff stated in its Letter that since payment of the indebtedness following acceleration

is viewed as a prepayment, the creditor's prepayment rebate disclosure under section 226.8(b)(7) would apply and be controlling. As long as the creditor rebates unearned finance charges in accordance with its prepayment rebate disclosure, no further disclosure is required. However, if the creditor does not consider its prepayment rebate disclosure as controlling, then default charges disclosures would be required. This reading of the Letter would require the creditor to disclose and adhere to its rebate policy when the contract is entered into and thus removes the purely hypothetical concerns of Respondents and Clients Council.

2. Section 226.8(b)(7).

Section 226.8(b)(7) of the Regulation requires the creditor to disclose its method of rebate upon prepayment in full of the contract.[18] In its Official Staff Interpretation and Staff Letters, the Board's Staff has stated that a payment following acceleration is viewed as a prepayment; and the creditor's general disclosure of its rebate policy upon prepayment is sufficient. It is not necessary for the creditor to separately disclose its rebate policy upon payment of the indebtedness after acceleration. The Staff did not feel that the prepayment rebate disclosure should be unduly complicated and lengthened by referring to all of the possible events that could lead to a prepayment by the debtor.[19]

[18]12 C.F.R. §226.8(b)(7) (1978). This section of the Regulation has no counterpart in the Act.

[19]A debtor may choose to prepay a consumer installment contract for an infinite variety of reasons. Examples are: the desire to discharge the indebtedness early and receive a rebate of unearned finance charges; the desire to discharge the indebtedness early because the creditor has demanded payment as a result of a default under the contract; the desire to refinance the indebtedness; or the desire to sell or trade in collateral.

As stated by the United States in its Amicus Curiae Brief in favor of Petitioners:

> "Payment resulting from acceleration is, as the Board staff has correctly concluded, comparable to voluntary prepayment, which similarly involves early discharge of the loan obligation. Since the creditor's rebate policy on prepayment is already subject to disclosure, the Board staff has consistently interpreted Regulation Z since 1974 (see Pet. App. E 57a) to require a separate disclosure statement with respect to payment after acceleration only when the rebate in that event is different than the prepayment rebate." Brief for the United States at 26.
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> . . .
>
> "[T]he Board's position carries out the congressional purpose of informing the borrower of the cost of credit. If the rebate in the event of voluntary prepayment and payment after acceleration is the same and the creditor discloses the rebate policy with respect to voluntary prepayment, there is no significant public policy served by providing the borrower with a redundant separate disclosure of the rebate policy on acceleration, as the Ninth Circuit required in *St. Germain* and the instant cases." Brief for the United States at 24.

Respondents and Clients Council refer to an assortment of state laws that, unlike the Oregon statute, require a rebate of finance charges at dates other than a prepayment by the debtor. Resp. Br. at 46 and App. A; A.C. Br. at 38. However, neither the Act nor the Regulation require the creditor to disclose these state laws that have no relationship to a "prepayment" as that term is used in section 226.8

(b)(7). The Board has wisely concluded that the creditor's disclosure form should not be further lengthened and complicated by the disclosure of these state laws.

C. The Official Staff Interpretation Should Be Followed.

The Board's Official Staff Interpretation of the Regulation should be upheld unless it is plainly erroneous, even if alternative interpretations are available such as those proffered by the Respondents and Clients Council. *E.g., Zenith Radio Corp. v. United States,* 437 U.S. 443, 450-51 (1978); *Mourning v. Family Publications Service, Inc.,* 411 U.S. 356, 371-72 (1973); *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34 (1971); *Power Reactor Development Co. v. Electricians,* 367 U.S. 396, 408 (1961); *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965).

The rule of judicial deference to agency interpretations applies with special force to the Act and the Regulation. *Mourning v. Family Publications Service, Inc.,* 411 U.S. 356 (1973). *See* Brief for the Petitioners at 21-26. This rule of deference has received explicit Congressional approval in the specific context of Official Staff Interpretations. The express purpose of Congress in enacting section 130(f), 15 U.S.C. § 1640(f) (1976), was to vest the Board and its Staff with the authority to issue interpretations of the Act and the Regulation that could be safely relied upon by the credit industry in drafting disclosure forms. *See* Brief for the Petitioners, App. A at 10-17.

These cases graphically illustrate the dilemma faced by the consumer credit industry in drafting disclosure forms under the Act and the Regulation. The first

case to rule on the disclosure of acceleration clauses was *Garza v. Chicago Health Clubs, Inc.,* 347 F. Supp. 955 (N.D. Ill. 1972). In that case, the court held that an acceleration clause must always be disclosed as a "default, delinquency or similar charge" under section 226.8(b)(4) of the Regulation. Clients Council claims that, based upon this one decision, Petitioners and the credit industry should have immediately prepared and distributed new disclosure forms to comply with the court's holding. A.C. Br. at 9. This change in disclosure forms would have required an enormous expenditure of money by the industry[20] that would have been completely wasted since the holding in *Garza* has been unanimously rejected by seven federal appellate courts.[21] What has emerged in place of *Garza* is a conflict in the circuit courts that leaves creditors with no clear disclosure rule to follow. This conflict in the circuits demonstrates the waste and futility involved in trying to redraft and disseminate disclosure forms to satisfy each new disclosure rule imposed by the courts. It also demonstrates the wisdom of Congress in delegating to the Board the authority to determine what disclosures are required by the Act and the Regulation.[22]

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[20]The Amicus Curiae brief filed by the California Bankers Association points out that the cost to prepare and distribute new disclosure forms can exceed several million dollars for a single creditor having nationwide operations. Brief for the California Bankers Association as Amicus Curiae at 16.

[21]*See* note 25, *infra.*

[22]The central theme of the three Amicus Curiae Briefs filed by the credit industry is the desperate need for a ruling from this Court confirming the authority of the Board and its Staff to issue interpretive guidelines that can be safely relied upon in drafting disclosure forms. *See* Brief of the Consumer Bankers Association as Amicus Curiae; Brief for the California Bankers Association as Amicus Curiae; Brief Amici Curiae of National Consumer Finance Association and General Motors Acceptance Corporation.

Application of a rule of deference to both Board and Staff Interpretations recognizes the Board's specialized expertise and promotes the Congressional goals of simplicity, uniformity and understandability in credit cost disclosures—goals that are rapidly being submerged in a sea of Truth in Lending litigation.[23]

Applying this rule of deference, it is clear that the Official Staff Interpretation should be followed: it is reasonable; it is easy to understand and apply; it will promote the Congressional goals of simplicity and uniformity in credit cost disclosures; and it avoids the growing problem of disclosure overload.

Clients Council argues that this Court should not defer to the Official Staff Interpretation since the Board has not passed upon the acceleration question and Staff Interpretations are not entitled to judicial deference. A.C. Br. at 28-32. Acceptance of this argument would bring the administration of the Act and the

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[23]The October 15, 1979 issue of the Washington Credit Letter reports that:

> "The number of Truth in Lending suits filed in federal district courts has reached an all-time high, according to new figures released by the administrative office of the U.S. Courts.
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> During the 12 months ending last June 30, a total of 2,340 suits were filed, up 19.57 percent (383 cases) from 1977-78.
>
> The 1978-79 totals top the previous record of 2,237 suits filed in 1974-75." Washington Credit Letter at 5 (October 15, 1979).
>
> . . .
>
> "These figures reflect only the number of Truth in Lending suits filed in federal district courts. They do not include TinL suits filed in state courts or in bankruptcy proceedings in which alleged Truth in Lending violations are raised by way of counterclaim or offset. No central agency collects statistics on these filings." Washington Credit Letter at 8 (October 15, 1979).

Regulation to a virtual standstill. The Board is obviously not in a position to address every question of interpretation that may arise under the Act and the Regulation. It has therefore delegated to its Division of Consumer Affairs the primary responsibility to interpret the complex disclosure requirements of the Act and the Regulation. 41 F.R. 28256, July 9, 1976; 43 F.R. 18540, May 1, 1978. Only controversial issues involving substantial ambiguities that raise significant policy questions are reserved to the Board. 41 F.R. 28256, July 9, 1976. This Board delegation to its Staff has received express Congressional sanction in the specific context of the Act and the Regulation. 15 U.S.C. § 1640(f) (1976).

Clients Council also asserts that Staff Interpretations are unreliable indicators of the Board's views since they are written by "lone Board employees" who are ill-equipped to provide a comprehensive analysis of the Regulation. A.C. Br. at 28-30. This claim by Clients Council is both unfair and unfounded. In many respects, the Staff is better equipped than the Board to handle the day-to-day interpretive questions that arise under the Act and the Regulation because of its specialized expertise and experience in matters involving consumer credit. In Public Information Letter No. 444, the Deputy Secretary of the Board stated:

> "A staff opinion represents the informed view of the particular official responding to the inquiry, who is authorized by the Board to express opinions on the particular subject. While it is possible that in some instances it might not represent the position which the Board members themselves would take if they formally considered the issue, the Board considers the present informal and flexible procedure, by which members of its staff provide

opinions on regulatory provisions, an essential part of its operations.

It is the Board's view that the public is entitled to rely on a formal staff opinion unless and until it is altered by the Board after formal consideration. Where the issue involves a statement of legal position, it may be assumed that while the question discussed has not been presented to, nor reviewed by the Board, such view is believed by the staff to be legally sound and judicially sustainable, and would be recommended by the staff for Board adoption should the matter be presented to the Board." Public Information Letter No. 444 [1969-1974 Transfer Binder] Cons. Cred. Guide (CCH) ¶30,640, March 1, 1971.

The Board has supplied the Solicitor General with a Memorandum describing the procedures used in issuing Official Staff Interpretations. The Solicitor General and the Board have authorized Petitioners to supply this Memorandum to the Court. The Memorandum is reprinted as Appendix A to this Reply Brief. The Memorandum establishes that Official Staff Interpretations are published only after they have been carefully reviewed, analyzed and approved at various levels in the Board, and such Interpretations are reviewed quarterly by members of the Board.

Finally, Clients Council claims that Staff Interpretations should be ignored because they are not subject to public review and comment. Clients Council states that the Official Staff Interpretation at issue in these cases was adopted before the Board established procedures that offer the opportunity for public review and comment. A.C. Br. at 28. This is simply not so. When Official Staff Interpretation No. FC-0054 was adopted, the Board had established procedures calling for publication of Official Staff Interpretations in the Federal Register, review by the public, and reconsideration upon request by any member of the public. 41 F.R. 28255-56, July 9, 1976. Official Staff Interpretation No. FC-0054 was published in the Federal Register in accordance with these procedures. 42 F.R. 18056, April 4, 1977. The Board's procedures for issuing Official Staff Interpretations currently in effect are equivalent to informal publication, notice and comment rulemaking under section 553 of the Administrative Procedures Act. *Compare* 5 U.S.C. § 553 (1976) *with* 43 F.R. 18539-18540, May 1, 1978.

Acceptance of the extreme arguments made by Clients Council would have an enormously disruptive effect upon the orderly administration of the Act and the Regulation.[24] It would also impose a penalty of truly staggering proportions upon the consumer credit industry. Clients Council argues that the Official Staff Interpretation concerning acceleration, which has been relied upon by the industry, should be rejected and that this Court should hold that the right of acceleration must be disclosed in all consumer credit contracts as a "default, delinquency or similar charge" under section 226.8(b)(4). Clients Council thus seeks to impose a multi-million dollar liability upon the consumer credit industry for failure to disclose acceleration clauses even though the Board has stated emphatically that such disclosures are not required and the United States Courts of Appeals for seven different circuits, including the court below, have unanimously agreed

[24]The United States points out in its Brief that judicial rejection of Official Staff Interpretations will prevent effective enforcement of the Act and the Regulation by the federal enforcement agencies. Brief for the United States as Amicus Curiae at 39 n. 18.

with the Board.[25] The only authority that Clients Council can garner to cast this massive punitive liability upon the industry is a district court decision[26] that has been expressly overruled on this very issue by the federal circuit court for its district.[27]

Respondents understandably reject the argument made by Clients Council. Respondents argue that the Official Staff Interpretation concerning acceleration is reasonable and should be adopted:

> "The Federal Reserve Board Staff has adopted an approach to the question of disclosure of finance charge rebates which is in accord with the principles of Truth in Lending. The Board's staff agrees that the effect of acceleration on the finance charge is important information to be disclosed to the consumer. Such a position is in accord with the purpose of the Act that the 'informed use of credit results from an awareness of the cost thereof by consumer,' and this position should be adopted. 15 USC § 1601(a)." Resp. Br. at 53.

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[25] *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975); *Martin v. Commercial Securities Co., Inc.*, 539 F.2d 521 (5th Cir. 1976), *as modified prospectively in McDaniel v. Fulton National Bank*, 571 F.2d 948 (5th Cir.) (*en banc*), *reh. denied*, 576 F.2d 1156 (5th Cir. 1978) (*en banc*); *Croysdale v. Franklin Savings Ass'n*, 601 F.2d 1340 (7th Cir. 1979); *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978); *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977); *Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753 (9th Cir. 1978) (following *St. Germain*); *Begay v. Ziems Motor Co.*, 550 F.2d 1244 (10th Cir. 1977); *Price v. Franklin Investment Co., Inc.*, 574 F.2d 594 (D.C. Cir. 1978).

[26] *Garza v. Chicago Health Clubs, Inc.*, 347 F. Supp. 955 (N.D. Ill. 1972).

[27] *Croysdale v. Franklin Savings Ass'n*, 601 F.2d 1340 (7th Cir. 1979).

However, Respondents argue that the Staff should have equated acceleration with prepayment and, like the court below, required the creditor to disclose its rebate policy upon acceleration:

> "The rule of the Ninth Circuit is clear; it requires the creditor to disclose on the front of the contract whether a rebate of unearned finance charges will be made upon acceleration and the method by which the rebate will be made. This disclosure provides the consumer with all of the necessary information, and does not force the consumer to look elsewhere to find the information necessary to understand the effect of acceleration upon the finance charge." Resp. Br. at 49.

Respondents' argument should be rejected. Acceleration is not a prepayment and, for that reason, there are no unearned finance charges to be rebated upon acceleration. What Respondents are really attempting to accomplish through their proffered amendment to the Official Staff Interpretation is to indirectly require the disclosure of acceleration clauses which are not required to be disclosed by either the Act or the Regulation. The Official Staff Interpretation properly rejects the notion that acceleration and prepayment are equals. Instead, the Staff has concluded that payment following acceleration is essentially a prepayment and the creditor's prepayment rebate disclosure made under section 226.8(b)(7) is adequate. Since the Board's Official Staff Interpretation is a reasonable construction of its own Regulation, it should be considered controlling. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Thorpe v. Housing Authority*, 393 U.S. 268, 276 (1969); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

A more fundamental flaw in Respondents' argument is its unstated premise that a litigant may concede the reasonableness of an Official Staff Interpretation and at the same time seek judicial amendments to "improve" the Interpretation. Respondents have misconceived the role of the courts in reviewing agency interpretations. As stated by this Court in the specific context of the Regulation:

> "That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 371-72 (1973).

IV

THE NEW ISSUES RAISED FOR THE FIRST TIME IN THIS COURT BY RESPONDENTS AND CLIENTS COUNCIL HAVE NO MERIT.

A. Petitioners Have Not Violated Section 226.6(c) of the Regulation.

Respondents argue that Petitioners have violated section 226.6(c) of the Regulation which provides that:

> "At the creditor's or lessor's option, additional information or explanations may be supplied with any disclosure required by this Part, but none shall be stated, utilized, or placed so as to mislead or confuse the customer or lessee or contradict, obscure, or detract attention from the information required by this Part to be disclosed."

Respondents claim that since prepayment and acceleration are equivalents, Petitioners' prepayment rebate disclosure in paragraph 14 of the contract conflicts with the acceleration clause which does not disclose a rebate.

This argument is made by the Respondents for the first time in this Court. Respondents did not raise the argument or even cite section 226.6(c) in any brief or oral argument in any of the lower courts. The question was not listed as a question presented for decision in the Petition for a Writ of Certiorari or the Answer filed by the Respondents. Respondents' attempt to raise the issue at this late date violates Rule 23(1)(c) of the Rules of the Supreme Court of the United States.[28]

Even if the argument is considered, it should be rejected. Petitioners have already demonstrated that their prepayment rebate disclosure is consistent with and complements the acceleration clause. See discussion *supra* at pages 8-13. And, even if the two clauses were not consistent, the acceleration clause is on the reverse side of the contract and could hardly detract attention from the disclosures made on the front of the contract.

B. The $15.00 Acquisition Fee Has Been Properly Disclosed and Is Not a Default Charge as Claimed by Clients Council.

Clients Council raises a new issue that even Respondents do not assert. Clients Council asserts that the

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[28]This attempt by Respondents to inject a new issue into these cases in order to establish a violation of the Act and Regulation is not without precedent. The first time that Respondents raised section 226.8(b)(7) as an issue in these cases was in the Ninth Circuit after the decision was filed in *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977).

$15.00 fee that is deducted by Petitioners in calculating any rebate of unearned finance charges upon prepayment is a "default charge" that must be disclosed. A.C. Br. at 26-27.

This argument by Clients Council is difficult to follow since the acquisition fee is clearly disclosed by Petitioners in paragraph 14 on the front of the contract. J.A. 9, 65. The acquisition fee is an amount that is deducted in computing any rebate of unearned finance charges upon prepayment. It is not a "charge" imposed as a result of default and, in fact, has nothing to do with default under the contract. This claim by Clients Council should be rejected.

V
CONCLUSION.

For the reasons stated, Petitioners respectfully submit that the judgment of the court below should be reversed.

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APPENDIX A.

Memorandum.

BOARD OF GOVERNORS
of the
FEDERAL RESERVE SYSTEM

Date November 9, 1979
Office Correspondence
To Neil Butler and
Dolores S. Smith
From Lynne B. Barr
Subject: Issuance of Official
Staff Interpretations

As requested by the Justice Department, this memorandum is a brief summary of internal procedures employed by the Division of Consumer and Community Affairs from 1976 to the present with respect to official staff interpretations (OSIs) of Regulations B and Z. Many of these procedures were not changed when procedures for delayed effective dates and comment periods were adopted in 1978, and you can assume they are still in place unless I indicate otherwise.

It should be noted that the statutory provisions in question permit the Board to authorize any "official or employee of the Federal Reserve System" to issue interpretations or approvals under the regulations. One alternative available to the Board in 1976 was to authorize non-official staff members of the Board or other officials or employees of the System (such as Federal Reserve Bank personnel) to issue the interpretations. That course was not recommended by the staff to the Board because we felt that the interpretations should be uniform and should involve a relatively high level of review.

When the Board considered the designation of officials several Board members expressed concern about control and review of the interpretations. For that reason, a number of procedures were adopted by the Board. The first is the mandatory review of all OSIs by two officials of the Division. Each OSI is reviewed and initialed by one official before it is reviewed and signed by the official whose signature the letter bears.

Second, the Board decided that all OSIs would be reviewed quarterly by the Consumer Affairs Committee (the committee of Board members with oversight responsibility over the Division of Consumer and Community Affairs). At the time FC-0054 was issued, the Committee members reviewed the letters themselves. They now receive a summary of the letters.

Third, written internal procedures for preparation and issuance of the OSIs and unofficial interpretations were developed and circulated to all staff members. A copy of these procedures is attached.

The letters were and continue to be prepared in the following way. A request for an OSI is acknowledged and then assigned to a staff attorney for response. If the request appears incomplete or relevant documents were not included in the original request, the attorney will ask the requesting party for further information. A draft response to the letter is prepared, usually in consultation with other staff attorneys, section chiefs, and officials. An initial determination is made at that time whether or not the response should be official. This draft is often reviewed and discussed in group meetings with officials, section chiefs, and staff attorneys familiar with the subject matter. The letter is then issued after further review by the staff attorney's section chief and two officials.

As you know, OSIs were originally effective upon publication in the *Federal Register*, with provision for reconsideration upon request. One hundred forty-seven OSIs under Regulation Z and 10 under Regulation B were issued under this procedure. Of the Regulation Z OSIs issued between August 1976 and April 1978, approximately 6 were reconsidered, either by the Consumer Affairs Committee or the Board. None were changed.

In April 1978, the Board amended the procedures to provide a delayed effective date and a period for public comment if reconsideration of an OSI was requested. Of the 20 OSIs of Regulation Z issued since April 1978, 9 have been reconsidered; none were substantively changed as a result of the reconsideration and public comments.

Attachment
cc: Janet Hart

PROCEDURES FOR ISSUANCE OF INTERPRETATIONS OF REGULATIONS Z AND B

FAIR CREDIT PRACTICES SECTION
EQUAL CREDIT OPPORTUNITY SECTION

The purpose of this memorandum is to describe the procedures to be employed by staff of the Fair Credit Practices and Equal Credit Opportunity sections of OSCA in processing requests for Board interpretations and official staff interpretations of Regulations Z and B, and for issuance of unofficial staff opinion letters on those Regulations. Under these procedures, which are set forth in § 202.1(b) and (c) of Regulation B and § 226.1(c) and (d) of Regulation Z, there will be three kinds of interpretations of Regulations Z and B: (1) official Board interpretations, (2) official staff interpretations, and (3) unofficial staff interpretations. The procedures become effective July 30, 1976. A copy of the amendments to the Regulations is attached.

I. *Types of Interpretations*

1. *Formal Board interpretations* will continue to be issued only in response to those requests which involve "potentially controversial issues of general applicability which concern substantial ambiguities in the Regulations and raise significant policy questions." Board interpretations are published in the *Federal Register.*

2. *Official staff interpretations* will be issued in response to those requests which, in the opinion of one or more officers of OSCA, require clarification of technical ambiguities in the Regulation or which

have no significant policy implications. The official staff interpretations will be published in the *Federal Register,* with identifying details deleted. See Attachment A for examples.

3. *Unofficial staff interpretations* will be issued where the person making the request does not require the protection of the Act, where the issue is minor or has already been satisfactorily resolved, or where time strictures mandate a rapid response. These letters are not published in the *Federal Register* but may become part of the Board's Public Information file, depending on the significance of the opinion expressed therein. See Attachment B for examples.

II. *Processing of Requests*

Requests for interpretations of the Regulations will normally be addressed to the Director of OSCA. Letters addressed to other officials or employees of the Board, however, will also be considered as formal requests (if the nature of the request so indicates) and the same requirements will apply. All requests received in OSCA will be logged in, routed through the section chiefs of FCP and ECOA and assigned to individual staff members.

The assigned staff member will examine the request to determine that it contains a complete statement of all relevant facts, that all pertinent documents are included and properly incorporated and that the request states the specific provisions of the statute and Regulation which are at issue. If the request for interpretation is incomplete the staff member should either (1) acknowledge the request by mail and ask for more information, or (2) request the additional information by telephone. If by telephone, the person making the

request for interpretation should be asked to supply a copy of such additional information by mail in order to compile a complete written record of the relevant facts. It should be noted that while certain requirements for requests for interpretations are set forth in the Regulations (§ 226.1(d)(1) and § 202.13(c)(1)), these requirements are not inflexible and noncompliance with them should not be used to delay a request if the statement contained in the request is complete.

If the request for interpretation is complete (or upon receipt of the requested additional information), the staff member has five working days within which to make a recommendation to the section chief as to what type of response should be given. An initial determination as to the proper response will be made by the staff member and the section chief at that time. Within 15 days of the *receipt of the complete request by OSCA*, a substantive response will be sent to the person making the request or an acknowledgement will be sent which sets a reasonable time within which a substantive response will be given. Except in the most unusual cases, sixty days from the time a request is complete should be a sufficient amount of time in which to answer a request.

A discussion of the different types of interpretations, the criteria to be used in issuing such interpretations and varying procedures for their issuance is set forth below.

1. *Official Board interpretations* are formal interpretations of regulations issued only by the Board of Governors. They will be issued only upon those requests which involve "potentially controversial issues of general applicability which concern substantial ambiguities in the Regulations and raise significant policy questions."

When a determination is made by the staff member and section chief that a particular request poses issues of such significance that a formal Board interpretation may be desirable, the OSCA officials should be apprised of the issues. If the officials decide to recommend to the Governors' Committee that such an interpretation be issued by the Board, a draft Board memorandum should be prepared. The memorandum should state the issue involved and the reasons why the present status of the Regulation is inadequate to resolve the issue, and should suggest an approach to be taken in an official Board interpretation. This memorandum need not be accompanied by draft *Federal Register* material. If the Governors' Committee determines that an interpretation is necessary, the Board memorandum and *Federal Register* material will be prepared.

All official Board interpretations, except those which clearly deal with noncontroversial or technical issues, will be published for comment in the *Federal Register* before being issued in final form. See Attachment C for an example.

The *Federal Register* material for such interpretations should contain a docket number (issued by the Secretary's Office), a discussion of the substance of the interpretation and a statement that the interpretation is being issued for comment by the Board in order to assure an informed decision-making process. The comment period will be 30 days. The interpretation will become effective 60 days after issuance for comment (30 days after the close of the comment period) without further action by the Board, unless significant comments have been received. If such comments have been received, the section staff and OSCA officials will make recommendations to the OSCA Governors' Committee as to what changes, if any, should be made.

If the interpretation remains unchanged a *Federal Register* notice should be published, before the original effective date, which discusses the comments and states the Board's reasons for issuing the interpretation in final form as it was originally proposed. This notice would require Board action, usually on the consent calendar.

If the comments indicate and OSCA staff agree that the interpretation should be changed, a Board memorandum and *Federal Register* material outlining the changes and the reasons therefor should be prepared in advance of the original effective date and submitted through the OSCA Governors' Committee to the Board for approval. If the Board cannot act on the proposal before the original effective date, a notice postponing the effective date until further notice should be published in the Register (see p. 43 of FR *Document Drafting Handbook* for example). The interpretation will then be issued in final form in the *Register*. In most cases, the effective date should be delayed 30 days, but the delay can be waived in certain cases (5 U.S.C. § 553(d)).

2. Official staff interpretations will be issued in response to requests which require clarification of technical ambiguities in the Regulation or which have no significant policy implications. They are expected to be the bulk of the responses made by OSCA to requests for interpretation, and will generally cover, with some restriction, the same range of issues as the present Public Information Letters. They will be published in the *Federal Register*, with identifying details deleted, although such identification can be obtained through the Board's Public Information Office.

The staff member to whom the request has been assigned will decide, in conjunction with the Section

Chief, if the request should be answered with an official staff interpretation. If so, the letter will be drafted. Each letter should contain a complete recitation of the facts as they were presented in the request, and a statement that the response is based on only those facts. The letter should be approved by section level personnel and forwarded to (1) a designated official of OSCA who will approve and *initial* the interpretation, *and* (2) to the designated official who will both sign the letter and initial it. Each letter will be initialed by two OSCA officials.

Every official staff interpretation must contain the following statement denoting its status:

> This letter is an official staff interpretation of Regulation B(Z), issued, in accordance with § 202.13(c)(3) (§ 226.1(d)(3)) of the Regulation.

In most cases, the letter will be sent after it is signed to the person making the request, and a copy will be sent to the *Federal Register* for publication. The *Federal Register* material should be prepared as a rules document (see p. 12 of *Document Drafting Handbook* and Attachment C for an example), but without an explanatory preamble or a docket number (except when issued for comment). Each letter should have a short explanatory headnote (no more than two sentences).

Staff is encouraged to publish two or more staff interpretations within the same notice to avoid duplication of resources. The effective date does not need to be delayed as these interpretations are subject to the exception in 5 U.S.C. § 553(d) for interpretative rules. Staff interpretations should be numbered consecutively in the following manner: *Regulation B—12 CFR*

Part 202, EC-0001; Regulation Z—12 CFR Part 226, FC-0001.

Certain official staff interpretations will be published for comment prior to their effective date. When a request for interpretation poses a novel or controversial question which is not of sufficient importance to warrant a Board interpretation but would be subject to differing views by interested parties, the interpretation should be published for comment in the *Register*. The inquiring party should be notified that the interpretation is being published for comment before being issued in final form. The procedures to be followed for such publication are identical to those used for official Board interpretations (see page 4), except that the staff interpretation will be written as a letter response to a request and will be approved by two OSCA officials. Comments received on the proposal will be reviewed by staff, and OSCA officials will approve the final form of the interpretation.

The OSCA Governors' Committee will review all official staff interpretations on a quarterly basis and each section chief will be responsible for providing the Director of OSCA with a complete reading file of official staff interpretations, normally within 15 days after the end of the quarter.

3. *Unofficial staff interpretations* will be issued by OSCA staff in those cases where the protection of the Act is neither requested nor required or where a speedy response is required. These letters will usually be issued in the following cases:

1. The question has been satisfactorily answered in the past by an official letter or by a Public Information Letter, which has not been given official status and which does not warrant such status.
2. The request involves narrow issues that do not affect a significant number of creditors.
3. The person making the request requires a rapid response.
4. The person making the request does not seek the Act's protection.
5. The request for official staff (or Board) interpretation is answered in the negative.

The staff member, in conjunction with the section chief, will determine that a request should be answered with an unofficial interpretation. The letter will be drafted, approved and signed by the section chief or the staff member. Each letter which responds to a request for an official interpretation should contain an explanation of the reasons why an unofficial interpretation has been issued instead. Generally, the reasons for denial can be couched in the language of the Regulation (see § 202.13(c)(4) and § 226.1(d)(4)).

Every unofficial staff interpretation must contain the following statement denoting its status:

> This is an unofficial staff interpretation of Regulation B(Z).

Unofficial interpretations will be sent to the person making the request and will, if the material contained in the letter is of sufficient interest, become part of the Public Information file.

4. *Reconsideration of official staff interpretations* by the Board may occur upon request of interested parties. Requests for reconsideration must be made

within 30 days of final publication in the *Register* and will be addressed to the Secretary of the Board. The request for reconsideration must be granted or denied within 15 days of receipt or an acknowledgement sent which sets a reasonable time within which a response will be given. OSCA staff of the relevant section and officials will study the request and make an independent recommendation to the OSCA Governor's Committee. The person who made the original request for interpretation, if different from the person requesting reconsideration, should be contacted informally concerning the request for reconsideration, and an opportunity given to that person to comment upon it prior to the Committee's decision. The Committee will decide whether or not to grant the request for reconsideration.

If the request is denied, a response, signed by the Secretary and drafted by OSCA staff, which states the reasons for the denial, will be sent to the person making the request.

If the request for reconsideration by the Board is granted, staff will prepare a Board memorandum. If the Board determines that the staff interpretation should remain unchanged, the person making the request will be so notified by a letter from the Secretary which has been drafted by OSCA staff. If a decision is made by the Board that the interpretation should be changed, the new interpretation will be drafted by OSCA staff. signed and initialed by OSCA officials and should be published in the *Federal Register,* with a notice which rescinds the previously issued interpretation. The person who made the original request for interpretation should be notified by OSCA officials of the action taken.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of November, A.D. 1979.
